

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DONNA R. NELSON, an individual and
on behalf of the general public,

Plaintiff,

vs.

BIC USA, INC., a Delaware corporation,
and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 07cv2367-LAB (RBB)
**ORDER DENYING MOTION TO
REMAND**

[Dkt No. 14, 15]

This putative class action is before the court on Plaintiff's Motion To Remand For Lack Of Subject Matter Jurisdiction ("Motion"). Plaintiff contends defendant BIC USA, Inc. ("BIC") improperly removed the case from state court because the amount in controversy does not exceed the jurisdictional threshold of \$5,000,000.00 exclusive of interest and costs under the Class Action Fairness Act of 2005 ("CAFA"), codified at 28 U.S.C. §§ 1332(d) and 1453(b), depriving this court of subject matter jurisdiction. The court finds the issues presented appropriate for decision on the papers and without oral argument, pursuant to Civil Local Rule 7.1(d)(1). For the reasons discussed below, the Motion is DENIED.

I. BACKGROUND

Plaintiff alleges three causes of action under California consumer protection, false advertising, and unfair competition statutes associated with BIC's sale of its J-26 Maxi disposable lighters Plaintiff alleges falsely claim to be "Made in the USA." As pertinent here,

1 the Complaint expressly alleges no putative class member individually claims more than
 2 \$10.00 in damages, the amount in controversy as to all putative class members, "inclusive
 3 of attorneys' fees and costs, and injunctive relief (to the extent it can be valued) does not
 4 exceed \$4,999,000," under "no scenario, is the total amount of damages that Plaintiff seeks
 5 in this action in excess of \$4,999,000" and, accordingly, "no federal court has 'original
 6 jurisdiction' over this claim pursuant" to CAFA.¹ Compl. ¶ 24. Plaintiff contends on that
 7 basis BIC has not and cannot meet its burden to establish federal jurisdiction, and this court
 8 must remand the case to Superior Court. See Abrego Abrego v. The Dow Chemical Co.,
 9 443 F.3d 676 (9th Cir. 2006) (holding CAFA did not shift the burden to establish there is no
 10 removal jurisdiction to the party contesting removal, but rather the burden remains on the
 11 party seeking removal).²

12 BIC opposes remand on grounds plaintiff's statements of the amount of damages fail
 13 to include any calculation of the value of the other remedies plaintiff seeks, in addition to
 14 damages, such as restitution and disgorgement. Moreover, BIC contends even were the
 15 court to look only at the alleged \$10.00 maximum per putative class member's damages, the
 16 jurisdictional threshold is satisfied. The Complaint defines the putative class as all
 17 purchasers of BIC J-26 Maxi "Made in the USA" lighters in California during the class period.
 18 Compl. ¶¶ 1, 20. BIC supports its argument with the Declaration of its Senior Director of
 19 Sales, Steve Milkey, who avers BIC's sales data for the period November 14, 2003 through
 20 November 13, 2007 (the filing date of this action) shows "BIC sold more than 50 million J-26
 21 'Made in the USA' (i.e., 'Maxi') lighters in the State of California." Milkey Decl. ¶ 4. In

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 23 ¹ The pleading of an express damages total distinguishes the pleading of the same claims
 24 and theories of recovery in a prior case removed to this court with a different putative class
 25 representative. See Levine v. BIC 07cv1096-LAB(RBB). After this court denied plaintiff's Motion To
 Remand the Levine case, plaintiff voluntarily dismissed that action. This action essentially reprises
 the same claims and factual predicates as that case, but repleads the damages allegations and alters
 the standard of review.

26 ² The Abrego Abrego court grappled with the category of cases the CAFA had newly
 27 identified as "mass actions," distinct from the more traditional "class action," particularly with respect
 28 to the requirement that in a "mass action," not only must the aggregate amount in controversy be \$5
 million dollars, but also each plaintiff must satisfy the jurisdictional amount in controversy requirement
 of 28 U.S.C. § 1332(a). 28 U.S.C. § 1332(d)(11)(B)(i). The latter requirement is not imposed on
 CAFA class action plaintiffs.

1 particular, based on his "extensive sales experience selling BIC® lighters and based on
 2 sales, marketing, shipping and other related data, BIC's J-26 'Made in the USA' lighters were
 3 ultimately sold to far more than 500,000 individuals who, based on my review of the
 4 Complaint, would fall within the purported class." Id. On that basis alone, BIC contends the
 5 CAFA jurisdictional threshold is satisfied. Opp. 4:11-27.

6 As pertinent to Plaintiff's equitable remedies allegations, such as disgorgement of
 7 allegedly ill-gotten gains, Mr. Milkey further declares "from November 14, 2003 through
 8 November 13, 2007, BIC received in excess of \$5 million dollars in revenues from the sale
 9 of BIC J-26 'Made in the USA' Maxi lighters in the State of California," and "BIC's profits from
 10 [those sales] are also in excess of \$5 million dollars." ³ Id.

11 II. DISCUSSION

12 A. Legal Standards

13 Federal courts are courts of limited jurisdiction. Lowdermilk v. U.S. Bank Nat'l Ass'n,
 14 479 F.3d 994, 997 (9th Cir. 2007). When a plaintiff files an action in state court, there is a
 15 presumption against removal.⁴ See Gaus v. Miles, 980 F.2d 564, 567 (9th Cir. 1992)
 16 (substantiating a defendant seeking removal and to avoid remand must identify specific
 17 factual allegations or provisions in the Complaint that might support its assertion the amount
 18 in controversy exceeds the jurisdictional minimum amount); see also Singer v. State Farm
 19 Mut. Auto. Ins. Co., 116 F.3d 373, 375 (9th Cir. 1997) (addressing comparable legal
 20 standards applicable to dismissal for want of jurisdiction in cases brought in federal court,
 21 i.e., "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional

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 23 ³ Mr. Milkey also declares the cost of compliance should plaintiff prevail on her request for
 24 an injunction would be not only "extraordinary" but "practically speaking, impossible" because of, *inter*
 25 *alia*, Customs Regulations requiring that BIC identify the J-26 lighter's country of origin as "Made in
 the USA," and BIC's inability to prevent retailers and distributors of its products outside California
 from selling to consumers inside California. Milkey Decl. ¶ 5.

26 ⁴ "[I]n cases brought in the federal court . . . [i]t must appear to a legal certainty that the
 27 [plaintiff's] claim is really for less than the jurisdictional amount to justify dismissal. . . . A different
 28 situation is presented in the case of a suit instituted in a state court and thence removed. There is
 a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction
 on a federal court or that the parties have colluded to that end." Gaus, 980 F.2d at 566, quoting St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938).

1 amount to justify dismissal"). A plaintiff desiring to avoid removal jurisdiction can allege facts
 2 specific to the claims in the pleading which would narrow the scope of the putative class or
 3 the damages sought. All doubts and ambiguities are resolved against removal and in favor
 4 of remand. See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941).

5 The proponent has the burden of establishing removal jurisdiction. Lowdermilk, 479
 6 F.3d at 997; see Abrego Abrego, 443 F.3d at 682-83 (the removing defendant has "always"
 7 borne the burden of establishing federal jurisdiction, including any applicable amount in
 8 controversy requirement"), quoting Gaus, 980 F.2d at 566 ("Normally, this burden is satisfied
 9 if the plaintiff claims a sum greater than the jurisdictional requirement"); see also Serrano v.
 10 180 Connect, Inc., 478 F.3d 1018, 1021 (9th Cir. 2007). The amount in controversy is
 11 determined at the time of removal and is to be decided based on the allegations in the
 12 operative pleading. Lowdermilk, 479 F.3d at 994. In deciding the issue, the court treats
 13 claims for statutory damages by considering only those damages actually recoverable under
 14 the facts alleged. See Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 404-05 (9th Cir.
 15 1996) (defendant failed to carry its burden to show the amount in controversy exceeded the
 16 jurisdictional threshold, despite plaintiff's suit for treble punitive damages under Cal. Civ.
 17 Code § 3345, because that code section did not allow for trebling of contract damages).

18 The Lowdermilk court reviewed the three pleading "scenarios" discussed in Abrego
 19 Abrego affecting the amount in controversy determination and standards of review.
 20 Lowdermilk, 479 F.3d at 998. In the first scenario, when plaintiff **fails to plead a specific**
 21 **amount of damages**, the defendant "must prove by a preponderance of the evidence that
 22 the amount in controversy requirement has been met." Abrego Abrego, 443 F.3d at 683,
 23 citing Gaus, 980 F.2d at 566; Lowdermilk, 479 F.3d at 998 (when the plaintiff does not
 24 specify an amount of damages in a class action lawsuit, for removal purposes "Defendant
 25 must prove by a preponderance of the evidence that the damages claimed exceed
 26 \$5,000,000"). Under the preponderance of evidence standard, a defendant need only make
 27 a factual showing it is more likely than not the amount in controversy exceeds \$5 million
 28 dollars. Singer, 116 F.3d at 376; Sanchez, 102 F.3d at 404. In the second scenario, if the

1 complaint **alleges damages in excess of the federal amount-in-controversy**
 2 **requirement**, the amount-in-controversy requirement is presumptively satisfied unless "it
 3 appears to a 'legal certainty' that the claim is actually for less than the jurisdictional
 4 minimum." Abrego Abrego. 443 F.3d at 683 n.8, *citing Sanchez*, 102 F.3d at 402.

5 The Abrego Abrego court did not decide the standard to apply in the third scenario,
 6 when the **complaint alleges damages less than the jurisdictional amount**. Lowdermilk
 7 resolved the question: "when the plaintiff has pled damages *less than* the jurisdictional
 8 amount, what must the defendant prove in order to remove the case to federal court?" Id.
 9 at 996. As a threshold matter, the Lowdermilk court first had to decide whether the manner
 10 of pleading -- referencing a specific dollar amount just below the jurisdictional limit -- qualified
 11 as an averment of a "specific amount in damages," and concluded it did, contrary to
 12 defendant's contention that because the pleading "failed to specify [plaintiff's] damages,
 13 Defendant must prove only by a preponderance of the evidence that the damages claimed
 14 exceed \$5,000,000." Lowdermilk, 479 F.3d at 998.

15 Our starting point is "whether it is 'facially apparent' from the
 16 complaint that the jurisdictional amount is in controversy."
Abrego Abrego, 443 F.3d at 690 We have reserved the
 17 preponderance of evidence standard for situations where a
 18 plaintiff "seeks no specific amount in damages," Abrego Abrego,
 19 443 F.3d at 688 (footnote omitted), and a court is forced to look
 20 beyond the complaint to determine whether the suit meets the
 21 jurisdictional requirements.⁵ Here, we need not look beyond
 22 the four corners of the complaint to determine whether the CAFA
 23 jurisdictional amount is met, as Plaintiff avers damages ("**less**
 24 **than five million dollars**") that do not reach the threshold for
 25 federal jurisdiction. **We hold that Plaintiff did plead a**
"specific amount in damages," and therefore, the
preponderance of the evidence standard does not apply.

26 Lowdermilk, 479 F.3d at 998 (emphasis added); see Singer, 116 F.3d at 377 ("The district
 27 court may consider whether it is 'facially apparent' from the complaint that the jurisdictional
 28 amount is in controversy").

26 ⁵ "In Abrego Abrego, for example, the complaint asked only for 'pre-and-post-judgment
 27 interest, attorney's fees and costs, and relief in the form of special, general, punitive and exemplary
 28 damages due and awardable pursuant to the actions of Defendants.' 443 F.3d at 688 (internal
 quotation marks omitted). Because damages were not quantified, we looked beyond the complaint
 to 'consider facts in the removal petition.' Id. at 690 (quoting Singer v. State Farm Mut. Auto. Ins.
Co.] 116 F.3d [373] at 377 [9th Cir. 1997]." Lowdermilk, 479 F.3d at 998 n. 4.

1 Plaintiff here has pled "a specific amount in damages" within the four corners of the
2 complaint by averring "the amount of damages does not exceed \$4,999,000," expressly
3 specifying the class damages to be \$1,000.00 less than the CAFA jurisdictional threshold.
4 However, Plaintiff also avers that "the 'amount in controversy' does not exceed \$10.00 as
5 to any particular class member." Compl. ¶ 24. The court accordingly finds the standards
6 of the Abrego Abrego/Lowdermilk "third scenario" govern the amount in controversy
7 determination for purposes of deciding this Motion, rather than a preponderance of evidence
8 standard, but also that BIC is entitled to attempt the requisite showing to carry its evidentiary
9 burden the *actual* amount the Complaint allegations place in controversy exceeds the
10 jurisdictional threshold required to satisfy that CAFA element.

B. CAFA Removal Jurisdictional Exists

Informed by the principle that federal courts are courts of limited jurisdiction, so strictly construe their own jurisdiction, and by the well-established principle the plaintiff is "master of her complaint" and can plead to avoid federal jurisdiction, the Lowdermilk court held "a defendant will be able to remove the case to federal court **by showing** to a legal certainty that the amount in controversy exceeds the statutory minimum" in situations where a plaintiff has expressly pled a damages amount *under* the jurisdictional minimum.⁶ Lowdermilk, 479 F.3d at 998-99 (bolding added). Plaintiff argues she should be "master of her own complaint," permitted to intentionally avoid federal jurisdiction by electing to limit the amount of damages sought to a figure below the CAFA threshold. Nevertheless, applying the "legal certainty" standard to the amount in controversy issue presented here, the court finds BIC carries its burden to demonstrate this court can exercise removal jurisdiction.

24 ⁶ "By adopting 'legal certainty' as the standard of proof, we guard the presumption against
25 federal jurisdiction and preserve the plaintiff's prerogative, subject to the good faith requirement, to
26 forgo a potentially larger recovery to remain in state court," and such a standard "also maintains
27 symmetry in our rules requiring legal certainty as the standard of proof" in that "we already require
28 that a defendant seeking remand for a case initially filed in federal court must show with 'legal
certainty' that the claim is actually for less than the jurisdictional minimum." Lowdermilk, 479 F.3d
at 998-99 *citing Sanchez*, 102 F.3d at 401-02. Thus, when the damages sought by plaintiff appear
from the four corners of the complaint to be less than the jurisdictional amount, the defendant
seeking removal "must not only **contradict** the plaintiff's own assessment of damages, but must
overcome the presumption against federal jurisdiction" **by showing** plaintiff is legally certain to
recover at least five million dollars, assuming proof of liability. Lowdermilk, 479 F.3d at 999.

1 First, the court overrules Plaintiff's objections to the Declaration of Steve Milkey, BIC's
2 Senior Director of Sales, offered in support of BIC's position this court has original subject
3 matter jurisdiction over the controversy. Dkt No. 21-2. Plaintiff argues the court should
4 disregard the "conclusory declaration from Mr. Steve Milkey" as "irrelevant, lacking
5 foundation, and violative of the best evidence rule to the extent Mr. Milkey's declaration is
6 based on his review of business records." Reply 6:24-27. Plaintiff relies on the Lowdermilk
7 statement a court "**need not** look beyond the four corners of the complaint to determine
8 whether the CAFA jurisdictional amount is met." Reply 6:22-23, quoting Lowdermilk, 479
9 F.3d at 998 (emphasis added). However, the Lowdermilk court was simply determining what
10 standard would apply in the circumstance when the plaintiff pleads "a specific amount in
11 controversy" of "less than five million dollars." This court does not construe that language
12 as operating to preclude the court from looking beyond the four corners of the complaint for
13 purposes of deciding jurisdiction.

14 The court looks beyond the four corners of the Complaint for purposes of satisfying
15 itself a proper foundation exists for the exercise of removal jurisdiction. The question
16 requires the defendant to carry a burden of proof to overcome the pleading of an amount in
17 controversy stated in the Complaint to be under the jurisdictional threshold. The court
18 overrules Plaintiff's objections to the Milkey Declaration, finding he is competent to
19 substantiate the quantity of lighter sales and the likely number of purchasing consumers
20 within the class period for purposes of deciding the issue, based on his experience, position
21 within the company, and the review he declares he undertook of relevant sales, marketing,
22 and other BIC data.

23 Mr. Milkey's testimony provides an adequate evidentiary basis to support BIC's
24 representation the "amount of damages" in controversy, standing alone, satisfies the
25 jurisdictional threshold. Although the Complaint expressly attempts to avoid CAFA removal
26 jurisdiction through the manner of its pleading of damages, the putative class definition and
27 the \$10.00 maximum per putative class member alleged in the Complaint, multiplied by Mr.
28 Milkey's determination "far more than 500,000 individuals . . . would fall within the purported

1 class" of purchasers of the J-26 "Made in the USA" Maxi lighters within the class period,
 2 based on "sales, marketing, shipping, and other related data," demonstrate to a legal
 3 certainty the CAFA amount in controversy threshold is satisfied, in reliance on that
 4 calculation alone and without reaching the value of Plaintiff's additional equitable claims for
 5 restitution, disgorgement of profits, injunctive, and other relief.

6 Even were Plaintiff's representation "under no scenario, is the total amount of
 7 damages that Plaintiff seeks in this action in excess of \$4,999,000" (Compl. ¶ 24) accurate,
 8 the "amount in controversy" measure is not co-extensive with the "amount of damages"
 9 sought. The jurisdictional requirement is satisfied if either party can gain or lose the
 10 jurisdictional amount. See Ridder v. Blethen, 142 F.2d 395, 399 (9th Cir. 1944). Assuming
 11 without deciding Plaintiff is correct that the rationale of In re Ford Motor Co./Citibank, 264
 12 F.3d 952 (9th Cir. 2001) applies here, i.e. the "nature of the right asserted" rather than
 13 defendant's costs to comply with requested injunctive relief forecloses inclusion of
 14 associated administrative costs as part of the amount-in-controversy demonstration, the
 15 court deems the actual damages alleged per class member to be sufficient to support CAFA
 16 removal jurisdiction.⁷ In addition, the court is not persuaded by Plaintiff's challenges to BIC's
 17 revenues and profits showing, since the Complaint allegation of total damages "not to
 18 exceed" \$4,999,000.00 is just \$1,000 shy of the jurisdictional threshold. The value of the

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20 ⁷ The In re Ford court held the projected administrative costs of complying with a claim for
 injunctive relief that accompanies other claims for monetary relief should not provide the basis upon
 which diversity jurisdiction removal is allowed for purposes of establishing the amount in controversy.
In re Ford, 264 F.3d at 958-60; see also Kanter v. Warner-Lambert Co., 265 F.3d 853 (9th Cir. 2001)
 (holding it would be inappropriate to include the cost of plaintiffs' proposed injunctive relief, which
 would prohibit the defendant from advertising and selling a defective product, in evaluating whether
 the plaintiffs' claims exceed the amount in controversy requirement). However, the Kanter court, in
 focusing on the "nature of the right asserted," concluded on its facts that while the proposed
 injunction was a component of the relief sought, monetary damages were plaintiffs' "essential goal"
 in that litigation. From the manner of pleading, the court finds the "essential goal" of the Plaintiff here
 appears to protect the integrity of the "Made in the USA" designation more than to recover monetary
 damages. From that perspective, the amount in controversy could permissibly be evaluated in
 consideration of the other costs BIC is at risk of incurring should Plaintiff prevail on her requests for
 equitable relief under disgorgement, injunctive, and other theories. Moreover, Plaintiff relies on Snow
 v. Ford Motor Co., 561 F.2d 787 (9th Cir. 1977) for the proposition a defendant who invokes federal
 jurisdiction under the removal provisions cannot aggregate to fulfill jurisdictional amount requirements
 because plaintiffs were not permitted to do so. BIC argues plaintiffs are permitted to aggregate to
 invoke federal jurisdiction under 18 U.S.C. § 1332(d), so removing defendants should have reciprocal
 aggregation rights for amount in controversy jurisdictional purposes.

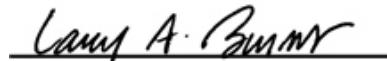
1 restitution or disgorgement component of her claims is surely more than nothing per sale,
2 and the number of purchasers and J-26 Maxi lighter profits BIC substantiates for the class
3 period indisputably add more than \$1,000 to the total amount in controversy. Plaintiff argues
4 "restitution" under the UCL claim is an equitable determination which she contends will
5 involve a measure of damages "substantially less than Defendant's 'overall revenues' or
6 'gross profits.'" Reply 6:14-15. Inasmuch as Mr. Milkey declares BIC's sales revenue, and
7 profit data establish either of those measures standing alone exceeds \$5 million (Milkey
8 Decl. ¶ 4), any fraction of those revenues or profits, even if "substantially less" than the total
9 of either but obviously greater than nothing, combined with the compensatory damages pled
10 in the Complaint as up to \$10.00 per class member, convinces this court that the amount this
11 action places in controversy exceeds the CAFA jurisdictional threshold.

12 **III. CONCLUSION AND ORDER**

13 For all the foregoing reasons, the court finds it may exercise subject matter jurisdiction
14 over this, and removal was proper. Accordingly, **IT IS HEREBY ORDERED** the Motion To
15 Remand is **DENIED**.

16 **IT IS SO ORDERED.**

17 DATED: April 1, 2008

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19 HONORABLE LARRY ALAN BURNS
20 United States District Judge
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